In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ROBERT BOYD RHOADES,

Defendant and Rhoades.

CAPITAL CASE

Case No. S082101

Sacramento County Superior Court, Case No. 98F00230
The Honorable Loyd H. Mulkey, Jr., Judge

SECOND SUPPLEMENTAL RESPONDENT'S BRIEF

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INTRODUCTION

In his Second Supplemental Opening Brief, Robert Rhoades asserts that recent case law and developments in *Batson/Wheeler*[1] jurisprudence lend further support to his argument that the trial court erred in failing to find that Rhoades established a prima facie showing of discrimination in the prosecutors' exercise of peremptory challenges. However, most of the case law cited by Rhoades involves a third-stage analysis under *Batson/Wheeler* and thus do not support his argument. Citations to other states' laws are also unavailing. Reviewed independently, the totality of the circumstances in this case demonstrates that Rhoades failed to meet his burden in establishing a prima facie showing of discrimination. The trial court properly denied the two *Batson/Wheeler* motions.

ARGUMENT

IX. RHOADES FAILS TO SHOW THAT THE TOTALITY OF RELEVANT CIRCUMSTANCES GIVES RISE TO AN INFERENCE OF DISCRIMINATORY PURPOSE IN THE PROSECUTORS' EXERCISE OF PEREMPTORY CHALLENGES

A. There Are Nondiscriminatory Reasons for the Peremptory Challenges That are Apparent from and Clearly Established in the Record and That Necessarily Dispel Any Inference of Bias

Rhoades argues that the reasons for the prosecutors' exercise of peremptory challenges to excuse the jurors at issue are speculative and do not prove the prosecutors' non-discriminatory intent. (SSOB 6-8.) He further contends that respondent is asking the Court to make up reasons the prosecutors may have had for excusing the African-American jurors. (SSOB 6.) On the contrary, nondiscriminatory reasons for the prosecutors' peremptory challenges are apparent from and clearly established in the

[1] *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

record. These reasons necessarily dispel any inference of bias by the prosecutors, and they are properly considered as part of the relevant circumstances on review of a first-stage *Batson/Wheeler* claim.

In determining the existence of a prima facie case at the first stage of a *Batson/Wheeler* motion, a reviewing court considers the entire record of voir dire as of the time the motion was made. (*People v. Lenix* (2008) 44 Cal.4th 602, 624.) Certain types of evidence may prove particularly relevant in these circumstances. (*People v. Bonilla* (2007) 41 Cal.4th 313, 342.) These relevant types of evidence include that a party has struck most or all of the members of the identified group from the venire, that a party has used a disproportionate number of strikes against the group, that the party has failed to engage these jurors in more than desultory voir dire, that the defendant is a member of the identified group, and that the victim is a member of the group to which the majority of the remaining jurors belong. (*Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) This Court has determined that "[a] court may also consider nondiscriminatory reasons for a peremptory challenge that are apparent from and 'clearly established' in the record [citations] and that necessarily dispel any inference of bias." (*People v. Scott* (2015) 61 Cal.4th 363, 384; *People v. Taylor* (2010) 48 Cal.4th 574, 644; accord, *United States v. Stephens* (7th Cir. 2005) 421 F.3d 503, 516, 518 ["the examination of 'apparent' reasons in the record . . . involves only reasons for the challenges that are objectively evident in the record" such that "there is no longer any suspicion, or inference, of discrimination in those strikes"]; cf. *Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1110 ["refutation of the inference requires more than a determination that the record could have supported race-neutral reasons for the prosecutor's use of his peremptory challenges"].) Thus, a court "'may consider apparent reasons for the challenges discernable on the record' as part of its

'consideration of "all relevant circumstances"' [citation]. . . ." (*Scott, supra*, 61 Cal.4th at p. 390.)

Here, there are nondiscriminatory reasons clearly established in the record that necessarily dispel any inference of bias as to each of the excused jurors. Rhoades does not challenge the reasons other than to assert collectively that these reasons are speculative. However, the reasons, which dispel any inference of bias in the prosecutors' exercise of the peremptory challenges, are based on the jurors' answers to juror questionnaires and to individual voir dire by the parties and court. These reasons are clearly established in the record of voir dire and are cited by respondent herein. (See Argument A1, *post*.)

Without articulating how the cases support his position, Rhoades cites to *People v. Gutierrez* (2017) 2 Cal.5th 1150 (*Gutierrez*), *People v. Cisneros* (2015) 234 Cal.App.4th 111 (*Cisneros*), and *Mitcham v. Davis* (N.D. Cal. 2015) 103 F.Supp.3d 1091 (*Mitcham*). (SSOB 7-8.) *Gutierrez* and *Cisneros* involve third stage *Batson/Wheeler* claims, and *Mitcham* involved federal habeas review of a claim of ineffective assistance of counsel based on the failure to make a *Batson/Wheeler* motion at trial. Standing alone, these cases do not support Rhoades's argument that the reasons for the prosecutors' exercise of peremptory challenges apparent from the record are speculative.

Rhoades also appears to argue that it is the prosecutors' burden in a first-stage *Batson/Wheeler* challenge to prove that the reasons for exercising the peremptory challenges did not involve non-discriminatory intent. (SSOB 6.) "There is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination." (*Bonilla, supra*, 41 Cal.4th at p. 341.) It is "the opponent of the strike [who] must make out a prima facie case by showing that the totality of the relevant facts gives rise

to an inference of discriminatory purpose in the exercise of peremptory challenges." (*Scott*, *supra*, 61 Cal.4th at p. 383.) This Court recently stated in *Scott*:

> The *Batson/Wheeler* framework is designed to enforce the constitutional prohibition on exclusion of persons from jury service on account of their membership in a cognizable group. It is also designed to otherwise preserve the historical privilege of peremptory challenges free of judicial control, which 'traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury.' [Citation.] A balancing of these competing interests explains why the party exercising a peremptory challenge has the burden to come forward with nondiscriminatory reasons *only* when the moving party has first made out a prima facie case of discrimination.

(*Id*. at p. 387, italics in original.)

Below, the trial court held that Rhoades had failed to make a prima facie case when he raised his *Batson/Wheeler* challenge. Thus, the inquiry in this case involves the correctness of the trial court's first-stage ruling that Rhoades did not make out a prima case, rather than whether the prosecutors established reasons showing nondiscriminatory justifications for the strikes.

1. Nondiscriminatory reasons for the strikes are clearly established by the record and dispel any inference of bias

As set forth above, in determining whether an inference of discrimination exists in a first-stage ruling of a *Batson/Wheeler* motion, this Court may consider "nondiscriminatory reasons for a peremptory challenge that are apparent from and 'clearly established' in the record [citations] and that necessarily dispel any inference of bias. [Citations.]" (*Scott*, *supra*, 61 Cal.4th at p. 384; see also *People v. Reed* (2018) 4 Cal.5th 989, 1001-1003; *People v. Sanchez* (2016) 63 Cal.4th 411, 435-439.) Here, the record clearly establishes nondiscriminatory reasons for the prosecutors' use of

peremptory challenges against the four jurors, and these reasons dispel any inference of bias.

Following a hung jury on Rhoades' first penalty phase trial, that phase was retried. The prosecutors were permitted to make their own assessment of whether a prospective juror could consider the death penalty if the juror believed facts and law supported such a verdict. Beginning with prospective juror Rakestraw, the record clearly shows that the prosecutors reasonably could have decided to strike this prospective juror because of her strong opposition to the death penalty. On her juror questionnaire, Rakestraw stated that she had a strong opinion about the death penalty, and she refused to answer 10 of the questions pertaining to the death penalty such as those asking for her opinion of the death penalty and the purpose it serves. (23 CT 6894.) Rakestraw answered yes to the question on the questionnaire that if she were given the choice between the death penalty and life in prison without the possibility of parole for a person convicted of first degree murder with special circumstances, she would **always** vote for life in prison without parole regardless of the facts and circumstances. (23 CT 6897, emphasis in original question.) Rakestraw also stated on the juror questionnaire that she felt that life in prison without the possibility of parole was a greater punishment than the death penalty. (*Ibid*.)

Rakestraw's strong opposition to the death penalty was further revealed in voir dire. When asked by trial counsel if she could consider both penalties, Rakestraw answered,

> I would be able to consider both penalties, yes, sir. I definitely have strong feelings about the death penalty, but I think I would truthfully be able to consider both penalties after hearing the evidence. I don't know, you know, what the evidence would prove. I -- I think I really could.

(25 RT 7665.) The prosecutor subsequently tried to clarify Rakestraw's position, asking, "I assume that you think that the death penalty is the

appropriate punishment in some cases at some times under some circumstances. Is that a fair statement?" (25 RT 7666.) To this, she responded, "No, I can't truthfully say that." (*Ibid*.) She explained, "I try to lead a Christian life, and my Bible says thou shalt not kill. It doesn't say [sic] give me any exceptions, it just simply states to me, and I believe it, says thou shalt not kill." (*Ibid*.) She "would have to really hear the evidence and weigh everything before I could honestly, you know, make a decision to go against what I've been taught to believe." (*Ibid*.) She thereafter equivocated and said that she could vote for the death penalty if she felt the factors in aggravation far outweigh those in mitigation. (25 RT 7666-7667.)

Regardless of Rakestraw's final equivocation, any prosecutor could have reasonably struck Rakestraw based on her strong statements in opposition to imposing the death penalty. This Court has held that a prospective juror's declaration of opposition to the death penalty, even when combined with some subsequent equivocation, reasonably dispels any inference of discrimination when that juror is challenged. (*Scott, supra*, 61 Cal.4th at p. 385; *People v. Sattiewhite* (2014) 59 Cal.4th 446, 470; *People v. Panah* (2005) 35 Cal.4th 395, 440-441.)

Like Rakestraw, prospective juror Ayers demonstrated that she was opposed to the imposition of the death penalty. She did not believe that the death penalty served any purpose, including to deter others from committing crimes. (24 CT 7425; 22 CT 6438-6439.) She believed that in some or most cases, the death penalty was unnecessary. (22 CT 6438.) She wrote on her juror questionnaire regarding the death penalty, "I can't support actions to kill a human as a sentence even if that individual has killed someone." (*Ibid*.) If she were in charge of making all of the laws, there would not be a death penalty. (22 CT 6440.) When asked what types

of cases or offenses the death penalty should be imposed for, Ayers responded, "None." (22 CT 6439.)

Ayers did note on her questionnaire that the death penalty may be appropriate for an intentional, premeditated killing. (22 CT 6440-6441.) However, on voir dire, Ayers explained that before she answered the questionnaire, she had not considered how she felt about the death penalty. (24 RT 7425.) As far as cases she was aware of, she did not see the purpose of the death penalty. (24 RT 7425-7426.) She qualified this by stating, "Of course, I wasn't there to try the case so I wasn't aware of the evidence and the circumstances behind the ruling." (*Ibid*.) If she viewed all the evidence she believed she would vote for the death penalty if that was the just verdict. (24 RT 7426.) The prosecutor clarified that guilt had already been determined in the case. (*Ibid*.) Ayers then offered that she could vote for the death penalty if she formed the opinion it was the appropriate punishment. (24 RT 7426-7427.)

The answers Ayers provided on the juror questionnaire evidenced strong opposition to the death penalty. The prosecutors reasonably could have found that based on her responses she was opposed to the death penalty and would have trouble voting for it if warranted, despite her later voir dire responses.

Prospective juror Richard likewise demonstrated she would be hesitant to sentence a defendant to death. Richard stated on her juror questionnaire that she did not have a strong opinion on the death penalty, and also wrote she was unable to provide her opinion on which crimes may warrant a sentence of death, saying it depended on the circumstances. (28 CT 8375, 8377-8378.) She did not agree with the Old Testament's statement of "an eye for an eye," but rather, stated that "Christ died on the cross for everyone's sins." (28 CT 8376.) Her views on the death penalty had changed over time as a result of the case of Karla Faye Tucker,

"because she proved that some people can change." (28 CT 8376.) Most of Richard's immediate family and close friends were against the death penalty. (28 CT 8377.) When asked whether there would be a death penalty if she were in charge of making all the laws, Richard stated, "[I] can't say." (*Ibid*.) She thought the death penalty was imposed randomly. (28 CT 8375.) When asked on the juror questionnaire whether a defendant who is convicted of sexual assault and murder of a child should receive the death penalty regardless of the facts and circumstances, Richard answered that it depends, noting "the facts surrounding the event are very important." (28 CT 8379.) When asked whether a defendant who is convicted of sexual assault and murder of a child should receive the life without the possibility of parole regardless of the facts and circumstances, Richard checked the line indicating she agreed somewhat. (*Ibid*.)

On voir dire, the prosecutor sought to clarify Richard's responses about the death penalty and to explore her ability to impose it if warranted. When the prosecutor asked whether, if Richard came to the conclusion under the law and based on the facts that the correct verdict in the case was the death penalty, would she vote for it, Richard stated, "Based on the information and the instructions that I have from the jury and what I've heard, if that's what's best, then, then I, you know, I could, you know, get in there and make the right decision." (26 RT 7937.) The prosecutor attempted to clarify his question, noting that he assumed she had not determined that the death penalty objectively appeared to be the correct decision. (*Ibid*.) Rather, he was asking whether she *would* vote for the death penalty if she came to the conclusion in her own mind. (*Ibid*.) Richard responded, "I suppose." (26 RT 7937-7938.) When asked if she came to the conclusion in her own mind that the correct decision was life without the possibility of parole would she vote for that, Richard responded, "yes." (26 RT 7938.)

Richard's voir dire answers concerning the death penalty, like her answers on her questionnaire, indicated she was equivocal, hesitant, and possibly unwilling to impose the death penalty. The prosecutors reasonably could have determined based on Richard's equivocal and seemingly reluctant answers to questions involving the death penalty that she may have been unable to impose the death penalty in this case.

With regard to Spruill, the fourth prospective African-American juror who was struck, the prosecutors reasonably could have found she would not be a suitable juror for the simple reason that Spruill had indicated she was unwilling and unable to fulfill her duties as a juror. Spruill had a six-month-old child and stated that she may be unable to fulfill jury duty because she was responsible for the care of her child. When asked if caring for her child would interfere with her ability to serve on the jury, Spruill stated, "I don't know, I just had a baby (6 mos. old) I can't say. He's still young and my husband travels so I get very stressed at times." (26 CT 7781.) When asked if she was willing to stay as long as necessary to complete the trial and jury deliberations if the case lasted longer than estimated by court or counsel, Spruill answered, "No." (*Ibid*.) She explained that she was the only one at work in charge of completing a budget/work plan for the year. (*Ibid*.) These responses showed that Spruill may not have been able to complete her services as a juror, and thus dispelled any inference of bias by the prosecutors in exercising a peremptory challenge to strike her.

In sum, nondiscriminatory reasons for excusing the four African-American women are apparent from and clearly established in the record. These apparent and clearly established nondiscriminatory reasons necessarily dispel any inference of bias by the prosecutors in exercising the peremptory challenges at issue.

2. Comparative juror analysis supports the plausibility of the clearly established reasons for striking the jurors

In the initial briefing, Rhoades argued that this Court should conduct a comparative juror analysis. (AOB 162-164.) Respondent argued that such an analysis was not required when the trial court denies a *Batson/Wheeler* motion at the first stage, but engaged in some analysis in any event to demonstrate that the comparison supported the trial court's finding. (RB 194.) This Court often declines to undertake comparative juror analysis at step one of the *Batson/Wheeler* framework. (*Reed, supra,* 4 Cal.5th at p. 1003; *Sanchez, supra,* 63 Cal.4th at p. 439; *Taylor, supra,* 48 Cal.4th at pp. 616-617.) Yet, it recently has recognized the utility of such an analysis in certain circumstances to assess whether a defendant established a prima facie case of bias. (See *Scott, supra,* 61 Cal.4th at p. 390; *Reed, supra,* 4 Cal.4th at p. 1002; *People v. Harris* (2013) 57 Cal.4th 804, 874-876 (conc. opn. of Liu, J.).) In this case, an analysis of the jurors struck by the prosecutors and the non-black jurors who were ultimately sworn supports the obvious nondiscriminatory reasons for the strikes.

No other sitting juror refused to answer the questions on the juror questionnaire concerning the death penalty as Rakestraw had. Rakestraw had stated that if she were given the choice between the death penalty and life in prison without the possibility of parole for a person convicted of first degree murder with special circumstances, Rakestraw would **always** vote for life in prison without parole regardless of the facts and circumstances. (23 CT 6897, emphasis in original question.) No sitting juror agreed with this strong of an assertion about their choice of penalty. Rakestraw had noted on her juror questionnaire that she felt that life in prison without the possibility of parole was a greater punishment than the death penalty.

(*Ibid*.) The sitting jurors identified by Rhoades, Juror Nos. 148, 142, 74, and 111, did not harbor such a belief.

Only one sitting juror offered a response that was in any way close to suggesting life without the possibility of parole was a greater punishment. Juror No. 86 stated that for some people, life in prison without parole could be worse than death and that he was not sure which penalty was worse. (24 RT 7444.) He explained that, personally, he would not want to spend the rest of his life in prison, but that he would not want to be executed either, so he could consider both punishments. (*Ibid*.) He stated he would have to listen to all of the evidence presented before determining which sentence was appropriate. (*Ibid*.) Moreover, Juror No. 86 observed that the death penalty should be imposed for a murder where the killer knew what he or she was doing at the time of the crime, and he checked all the boxes indicating the death penalty may be appropriate for all types of killing. (21 CT 6029-6030.) He also did not answer questions during voir dire concerning the death penalty with the hesitancy and equivocality displayed by Rakestraw. (24 RT 7444-7448.) Rather, he noted that the death penalty was an appropriate sentence for killing a child. During questioning by defense counsel, Juror No. 86 answered as follows:

> Q. Do you think that life without parole is -- is an appropriate punishment for someone who murders a child?
>
> A. I don't know if I can really answer that. That's what the law is, as I understand it, you got the two different types of punishment, it's a very nasty punishment --
>
> Q. But when at one point you indicate the punishment should fit the crime and so on, and that's the reason I ask that question. You say the punishment should fit the crime and, I guess, I'm trying to elaborate on that; what do you mean by that?
>
> A. Removing somebody's freedom to exist and go out as a penalty for killing a child, killing anybody, is, in my mind, appropriate. Um, I believe I went on to answer that question that

> I don't think torture in kind for torture would be appropriate because it's -- what do you gain by it? Some foreign governments advocate torture, they cut off your hands if you're caught stealing things like that. I don't know if they still do it today, but years ago, they did it.

(24 RT 7446-7447.) When asked if he could vote for the death penalty if he determined that was the right decision under the law and facts, Juror No. 86 responded, "Yes." (24 RT 7448.) Unlike Rakestraw, this juror did not express the kind of personal beliefs that may prevent him from voting for the death penalty.

In his opening brief, Rhoades compared Ayers with Juror No. 149, arguing that the juror was remarkably similar to Ayers with the exception of her race, which he argued raises an inference of discrimination. (AOB 173.) However, where Juror No. 149 indicated that she believed that if a heinous crime has been committed the death penalty should be given, Ayers stated that she could not support actions to kill a human as a sentence even if that individual has killed someone. (19 CT 5677; 22 CT 6438.) Juror No. 149 stated that the death penalty is a good law that served as a deterrent and should be imposed for crimes involving serial killers and parents who kill their children, among others. (19 CT 5677-5678, 5680.) Ayers, on the other hand, did not think the death penalty served as a deterrent, and when asked what types of crimes the death penalty should be imposed for, she stated, "none." (22 CT 6439.) While Ayers later allowed that the death penalty may be appropriate for a killing that was intentional and premeditated, Juror No. 149 stated several types of killing may justify the death penalty, including the killing of a child and killing combined with rape or sexual assault. (22 CT 6440-6441; 19 CT 5680.) If Juror No. 149 were in charge of making all the laws, the juror answered that there would be a death penalty to punish those who have committed horrible crimes (19 CT 5679), in contrast to Ayers who answered the same question by stating

she would not have the death penalty. (22 CT 6440.) In fact, all of the sitting jurors stated they would have the death penalty if they made the laws, with the exception of Juror No. 86 who stated it was difficult to answer the question, "but probably." (21 CT 6029.) In sum, the juror questionnaires demonstrate that Juror No. 149 was in favor of the death penalty as a punishment where warranted, while Ayers was not. Comparative juror analysis supports the clearly established reason apparent in the record that Ayers was struck based on her views in opposition to the death penalty.

Like Rakestraw and Ayers, Richard also displayed reluctance and equivocality concerning the death penalty, unlike the sitting jurors identified by Rhoades. Richard did not agree with the Old Testament's statement of "an eye for an eye," but rather, stated that "Christ died on the cross for everyone's sins," and she noted that her views had changed because of the Karla Faye Tucker case. (28 CT 8376.) None of the sitting jurors indicated a belief that convicted murderers should have their sentences commuted if rehabilitation is demonstrated, as occurred in the case of Tucker. While Richard was unable to say if she would have the death penalty if she made the laws (28 CT 8377), all of the sitting jurors except Juror No 86 would keep the death penalty. (21 CT 6029.) And Juror No. 86 observed that it was difficult to answer the question, "but probably." (*Ibid.*)

Richard wrote that she was unable to provide her opinion on which crimes may warrant a sentence of death, noting it depended on the circumstances. (28 CT 8375, 8377-8378.) Juror Nos. 149, 74, and 111, on the other hand, identified several crimes for which the death penalty may be appropriate. (19 CT 5680; 20 CT 5811-5812, 5855-5856.) Richard thought the death penalty was imposed randomly (28 CT 8375), while Juror Nos. 149, 142, 74, and 111, thought the death penalty was imposed about right

(19 CT 5680; 20 CT 5724, 5812, 5856.) And while Juror No. 142 stated imposition of the death penalty depended on the circumstances, this juror was of the opinion that the death penalty is sometimes appropriate and that the death penalty was imposed about right. (20 CT 5721, 5724.)

When asked if she were in charge of making all the laws whether there would be a death penalty, Richard stated, "[I] can't say." (*Ibid*.) This was in contrast to Juror Nos. 149, 142, 74, and 111, who all would have the death penalty if they were in charge of making the laws. (19 CT 5679; 20 CT 5723, 5811, 5855.) Richard thought the death penalty was imposed randomly (28 CT 8375), while Juror Nos. 149, 142, 74, and 111, thought the death penalty was imposed about right (19 CT 5680; 20 CT 5724, 5812, 5856).

The prosecutor asked whether Richard would vote for the death penalty if she came to the conclusion that under the law and based on the facts, it was the correct verdict in the case. Richard stated, "Based on the information and the instructions that I have from the jury and what I've heard, if that's what's best, then, then I, you know, I could, you know, get in there and make the right decision." (26 RT 7937.) The prosecutor attempted to clarify his question, noting that he assumed she had not determined that the death penalty objectively appeared to be the correct decision. (*Ibid*.) Rather, he was asking whether she would vote for the death penalty if she came to the conclusion in her own mind, and Richard responded, "I suppose." (26 RT 7937-7938.) None of the jurors identified by Rhoades were so equivocal in their responses to this question. (26 RT 7830 [Juror No. 149]; 24 RT 7740 [Juror No. 142]; 27 RT 8361-8362 [Juror No. 74]; 27 RT 8398 [Juror No. 111].) Thus, it is apparent from and clearly established by the record that the prosecutors excused Richard for the nondiscriminatory reason that she was equivocal at best about voting to impose the death penalty.

Finally, Spruill stated she did not know if caring for her six-month-old child would interfere with her ability to serve as a juror. (26 CT 7781.) No other sitting juror answered that they had a potential inability to serve on the jury. Further, Spruill also stated on her questionnaire that she was unwilling to stay as long as necessary to complete the trial and jury deliberations for a case that could last longer than estimated. (26 CT 7781.) No other sitting juror disclosed such an unwillingness to complete jury service; all stated they were willing to stay as long as necessary to complete the trial.

In sum, should this Court determine that comparative juror analysis would help in assessing whether Rhoades has established a prima facie case of discrimination, the analysis supports the nondiscriminatory reasons apparent in the record and dispels any inference of bias.

B. In a First Stage *Batson/Wheeler* Challenge, the Prosecutor's Actual Reasons for Exercising Peremptory Challenges Are Not a Consideration

Rhoades argues that there is nothing in the record to support a finding that the prosecutors did not have mixed motives or were not substantially motivated by race in excusing the jurors. (SSOB 9-10.) Such a showing in a first stage *Batson/Wheeler* claim is not required. A party exercising a peremptory challenge has no obligation to articulate a reason until an inference of discrimination has been raised. (*Scott*, *supra*, 61 Cal.4th at pp. 387-388; *People v. Garcia* (2011) 52 Cal.4th 706, 746.) Thus, the prosecutors were not required to disclose reasons for excusing the jurors at issue, and the trial court was not required to evaluate them, until a prima facie case was made. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1292; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1104–1105 & fn. 3.) Rhoades cites to federal case law, *Foster v. Chatman* (2016) 578 U.S. __, 136 S.Ct. 1737, *Crittenden v. Chappell* (9th Cir. 2015) 804 F.3d 998, and *Shirley v.*

Yates (9th Cir. 2015) 807 F.3d 1090, and a Third District Court of Appeal case, *People v. Douglas* (2018) 22 Cal.App.5th 1162. (SSOB 9-10.) These cases involved third-stage *Batson/Wheeler* claims and used varying approaches to analyzing situations where the prosecutor exercised a peremptory challenge which was at least in part based on a racially discriminatory motivation. These cases do not assist Rhoades' argument because this case involves a first-stage *Batson/Wheeler* challenge where the prosecutors declined to provide their reasons for excusing the African-American jurors. (30 RT 9022, 9046-9047.) The trial court found that Rhoades failed to establish a prima facie case. Accordingly, the prosecutors were not required to disclose reasons for excusing the jurors at issue.

C. Other Relevant Considerations Support the Finding of No Prima Facie Case, and the Cases Cited By Rhoades Do Not Affect the Analysis

Rhoades argues that the statistical evidence supports the inference of a prima facie case of discrimination, pointing out that the prosecutors had challenged 100 percent of available African-Americans. (SSOB 11.) The record does not support this assertion. At the time of Rhoades' first motion, the prosecutors had exercised peremptory challenges against three African-American women out of a total of five challenges exercised. At that time, it was unclear how many other African-Americans remained in the jury box and venire. However, the trial court pointed out that there were "a number of other [African-American] jurors in the venire in the courtroom" at the time. (30 RT 9021-9022.) Richard was among them. (30 RT 9025-9026.) At the time of the second *Batson/Wheeler* motion, the prosecutors had struck four African-American women out of eight challenges. Defense counsel had struck two African-American jurors as well. (30 RT 9040.) Thus, the record does not support Rhoades's

argument that the prosecutors struck 100 percent of the available African-American jurors.

The prosecution utilized 50 percent of their peremptory strikes (four out of eight) to excuse African-American women at the time of the second *Batson/Wheeler* motion. There were a total of 69 potential jurors in the venire following excusals for hardship and cause but before the parties exercised peremptory challenges. (29 RT 8932-8942.) It appears that a minimum of seven African-American jurors were in the venire (four struck by the prosecution, two struck by the defense, and the indication by the court there were a number of others in the venire). Thus, African-American jurors made up at least 10 percent of the venire. But this statistical analysis is incomplete without information from the record as to exactly how many African-American jurors were in the venire as a whole.

Citing *Gutierrez*, Rhoades argues that the possible reasons for excusing the jurors at issue do not trump the circumstances supporting an inference of discrimination. (SSOB 11-12.) He argues that the prosecutors must stand or fall on the explanations provided at the time of the court's ruling on the *Batson/Wheeler* motions. (*Ibid*.) Rhoades conflates the requirements of a first stage and third stage *Batson/Wheeler* challenge. As noted above, "[a] court may also consider nondiscriminatory reasons for a peremptory challenge that are apparent from and 'clearly established' in the record [citations] and that necessarily dispel any inference of bias." (*Scott*, *supra*, 61 Cal.4th at p. 384; *Taylor*, *supra*, 48 Cal.4th at p. 644.) Respondent has set out the nondiscriminatory reasons clearly established in the record that necessarily dispel any inference of bias as to each of the excused jurors. (See Argument A1, *ante*.)

Additionally, there are other relevant considerations supporting the finding that Rhoades failed to establish a prima facie case by raising an inference of discriminatory purpose by the prosecutors. The statistics here

show that the prosecutors excluded three African-American female jurors out of five peremptory challenges, followed by a fourth African-American woman out of eight challenges. The lack of information in the record to the contrary permits an inference that at the time the trial court heard Rhoades's second motion, there were likely no African-Americans sitting on the jury. (30 RT 9040.) However, the defense had exercised two of its peremptory challenges against African-American jurors, and it appears there were "a number" of other African-American prospective jurors still in the venire as noted by the trial court. (*Ibid*.)

The record demonstrates that the four challenged jurors did not share only the characteristic of being African-American women but were otherwise "as heterogeneous as the community as a whole." The prosecutors diligently and purposefully questioned each of the potential jurors. And Rhoades is a Caucasian and not a member of the group to which the prospective jurors at issue belong. Because the racial makeup of the jury is unknown, there is no evidence that the victim, a white child, was a member of the group to which a majority of the remaining members belonged. All of these factors support the finding that Rhoades failed to establish an inference of discriminatory purpose by the prosecutors as necessary for a prima facie case of discrimination in a first stage *Batson/Wheeler* challenge.

Rhoades argues that *Gutierrez* contradicts respondent's position, citing the requirement that a prosecutor "simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (AOB 11-12, citing *Gutierrez*, *supra*, 2 Cal.5th 1150, 1159, which quotes *Miller-El v. Dretke* (2005) 545 U.S. 231, 252.) He is incorrect. *Gutierrez* involved a third-stage *Batson/Wheeler* challenge in which the prosecutor provided reasons for each of its peremptory challenges after the court found that the defendant had successfully made a prima facie case. (*Gutierrez*,

supra, 2 Cal.5th at p. 1154, 1157.) This is a first-stage *Batson/Wheeler* case. Here, the trial court found that Rhoades failed to establish a prima facie case of discrimination in exercising the peremptory challenges, and the prosecutors were not required to prove reasons for striking the four African-American jurors. *Gutierrez* does not assist Rhoades.

Other cases cited by Rhoades also involve a third-stage analysis of the prosecutor's given reasons rather than, as in a first-stage case, the reasons apparent from the record for exercising a peremptory challenge. (*United States v. Petras* (5th Cir. 2018) 879 F.3d 155, 161; *Chamberline v. Fisher* (5th Cir. 2017) 855 F.3d 657, 667; *Bryan v. Bobby* (6th Cir. 2016) 843 F.3d 1099, 1110.) In these third-stage cases, the focus is on the actual explanations the prosecutors gave, and whether the trial courts found the explanations to be credible. The cases do not assist Rhoades.

In *Sanchez*, this Court pointed out that in a first-stage *Batson/Wheeler* claim, the prosecutor's statement of reasons to support a trial court's finding that defendant failed to make out a prima facie case of discrimination is not relevant. (*Sanchez, supra*, 63 Cal.4th at p. 435.) Instead, this Court took into consideration the fact that the record clearly established nondiscriminatory reasons for the peremptory challenges that dispelled any inference of bias. (*Id*. at pp. 436-437.) The reasons, apparent from the record, were used by the *Sanchez* court to conclude that the prosecutor had excused the jurors at issue for nondiscriminatory reasons and not due to group bias, and the discernable reasons were a consideration under the totality of the circumstances as they existed at the time of the trial court's ruling that no prima facie case had been established. (*Id*. at p. 437.) Accordingly, this Court may and should consider the apparent reasons for the challenges discernable on the record as part of its consideration of all relevant circumstances in reviewing this first-stage *Batson/Wheeler* ruling.

Rhoades cites *Johnson v. California* (2005) 545 U.S. 162 (*Johnson*), arguing that this Court may not rely on possible reasons the prosecutor may have had for excusing the four black women from the jury. (SSOB 12-13.) In *Johnson*, the Supreme Court held that "a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson*, *supra*, 545 U.S. at p. 170.) In that case, there were three black jurors remaining out of a total of 43 eligible jurors left after prospective jurors were removed for cause. The prosecutor used peremptory challenges to remove all three black jurors resulting in a jury that was all white. The defendant in the case was a black male accused of second degree murder and assault on a white child. (*Id*. at p. 164.) The high court found that the relevant facts gave rise to an inference of discriminatory purpose. The Court pointed out the comment by the trial judge "that 'we are very close,'" and the California Supreme Court's comment that "it looks suspicious that all three African-American prospective jurors were removed from the jury." (*Id*. at p. 173.) The Court held that those inferences that discrimination may have occurred were sufficient to establish a prima facie case under *Batson*. (*Ibid*.)

As this Court observed in *Sanchez*, reviewing courts may not uphold a finding of no prima facie case simply because the record suggests grounds for a valid challenge. (*Sanchez*, *supra*, 63 Cal.4th at p. 435, fn 5.) However, this Court reasoned that under *Johnson*, reviewing courts may consider, as part of the overall relevant circumstances, nondiscriminatory reasons clearly established in the record that necessarily dispel any inference of bias. (*Ibid*.)

Here, the facts are distinguishable from *Johnson*, and this Court examines the totality of the relevant facts, not merely a statistical disparity and comments by the trial court. The prosecutors struck four African-

American women from the jury but these four women were not the only African-American potential jurors in the venire. There were two others who had been struck by defense counsel (30 RT 9040), and an indication from the trial court that there were other African-American jurors in the venire, although it is not clear how many. (30 RT 9020-9021.) The lack of information as to exactly how many African-American jurors were in the venire as a whole renders the statistical evidence and analysis incomplete. Furthermore, in *Johnson*, the defendant was the same race as the jurors against whom the challenges had been improperly exercised. (*Johnson*, *supra*, 545 U.S. at p. 164.) Here, the defendant was not African-American and thus was not the same race as the stricken jurors.

As in *Johnson*, the trial court here seemed hesitant to find a prima facie case, stating, "any further matters of this kind will weigh heavily on this Court." (30 RT 9050.) It also stated that, "I'm very close, I'm going to go with *Howard* for the time being, but if I see very much more of this, I'm going to indicate to you, you may well have a serious problem on your hands." (*Ibid*.) Yet, there were significant differences between the jurors who were excused by the prosecution and the jurors who remained in the box, and the nondiscriminatory reasons for the peremptory challenges apparent in the record dispel any inference of bias. (See Argument A1, *ante*.) Thus, in this case, unlike *Johnson*, the totality of the circumstances, including the entire record of voir dire, do not support an inference of discriminatory purpose on the part of the prosecution.

Rhoades cites *City of Seattle v. Erickson* (2017) 188 Wash.2d 721 [398 P.3d 1124] (*Seattle*), which held that "the trial court must recognize a prima facie case of discriminatory purpose when the sole member of a racially cognizable group has been struck from the jury. The trial court must then require an explanation from the striking party and analyze, based on the explanation and the totality of the circumstances, whether the strike

was racially motivated." (*Id.* at p. 1131.) This case has no bearing here. First, the prosecutors in Rhoades' trial did not strike the sole member of a racially cognizable group. As noted by the trial court, the prosecution struck three and then four African-American jurors, and a number of other African-American jurors remained in the venire. (30 RT 9021-9022, 9040.) Second, this Court has not adopted the same bright-line rule the Washington court does in *Seattle*.

Finally, Rhoades cites to Washington General Rule 37, effective last year, which disallows a peremptory strike if "an objective observer could view race or ethnicity as a factor." (Washington Rule 37, subd. (e).) Under the rule, upon objection to the exercise of a peremptory challenge, the party exercising the peremptory challenge must articulate the reasons the peremptory challenge was exercised. (Washington Rule 37, subd. (d).) Rhoades also cites to cases from other states which utilize various jury selection practices. (AOB 15-17.) However, the laws and rules of other states are not binding authority on this Court. (*People v. Montes* (2014) 58 Cal.4th 809, 884; *People v. Hartsch* (2010) 49 Cal.4th 472, 509.) Furthermore, this Court has recognized that *Batson* granted flexibility in implementing relevant, even if diverse, approaches to implementing its framework. (*Scott, supra,* 61 Cal.4th at p. 394.) Thus, the manner in which Washington courts evaluate objections to the exercise of peremptory challenges has no bearing on this case. The sole consideration is whether the totality of circumstances in this case gave rise to an inference of discriminatory purpose.

D. Should This Court Find the Totality of Relevant Facts Give Rise to an Inference of Discriminatory Purpose, the Court Should Remand the Matter to Allow the Trial Court to Conduct the Second and Third Stage *Batson/Wheeler* Inquiries

Rhoades argues that, due to the passage of time since trial and the death of the trial judge, his judgment should be reversed rather than remanded to the trial court for further proceedings. (SSOB 17-19.) Respondent disagrees.

This Court has found that where a trial court erroneously fails to discern an inference of discrimination and terminates a *Batson/Wheeler* inquiry at the first stage, a reviewing court is generally required to order a remand to allow the parties and the trial court to continue the three-step *Batson/Wheeler* inquiry. (*Scott*, *supra*, 61 Cal.4th at p. 388; *People v. Johnson* (2006) 38 Cal.4th 1096, 1103-1104 [remanding for *Batson* hearing eight years after trial].) Penal Code section 1260 states that a reviewing court may reverse, affirm, or modify a judgment, or "if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances."

In *People v. Johnson*, *supra*, 38 Cal.4th 1096, this Court concluded that the unavailability of the trial court judge, as well as the general passage of time since the trial, would not necessarily make it impossible to conduct a fair *Batson* inquiry on remand. (*Id*. at pp. 1100-1103.) "Generally . . . if there is any reasonable possibility that the parties can fairly litigate and the trial court can fairly resolve the unresolved issue on remand, reviewing courts have ordered the remand with directions that the defendant must receive a new trial if, for one reason or another, a fair hearing is no longer possible." (*People v. Braxton* (2004) 34 Cal.4th 798, 818-819.)

Here, as in *People v. Johnson*, the court and the parties have the record, which includes all of the juror questionnaires and a complete

reporter's transcript of the jury selection. The prosecutors may still have notes from the jury selection process in Rhoades' trial. It is also possible that the prosecutors will be able to refresh their recollection and recall reasons for excusing the jurors. This was a high profile murder case in which a young child was brutally tortured and murdered. The penalty phase was a retrial after the first penalty phase jury could not reach a unanimous decision. It is likely that under these circumstances the prosecutors would be able to recall the jury selection process and their reasons for striking jurors. As in *People v. Johnson*, this Court should at least attempt to permit the trial court an opportunity to resolve the matter on remand. (*People v. Johnson*, *supra*, 38 Cal.4th at p. 1100.)

Accordingly, should the Court find a prima facie case of discrimination was established, it should order a limited remand of the matter to the trial court to determine if a second and third-stage analysis is practicable or if a new trial is required. (See *People v. Johnson*, *supra*, 38 Cal.4th at pp. 1103-1104.) If the trial court finds the prosecutors exercised the peremptory challenges for a nondiscriminatory reason, the trial court should reinstate the judgment. If the trial court finds that it cannot adequately undertake the second and third stage analysis or make a reliable determination, or if it determines that the prosecutors exercised their peremptory challenges improperly, it should set the case for a new trial of the penalty phase.

CONCLUSION

Based on the foregoing and prior briefing by Respondent, this Court should reject Rhoades' *Batson/Wheeler* challenge on appeal. In the alternative, should this Court find the totality of relevant facts give rise to an inference of discriminatory purpose, it should remand the matter to allow the trial court to conduct the second and third-stage *Batson/Wheeler* inquiry in accordance with *People v. Johnson*, *supra*, 38 Cal.4th 1096.

Dated: May 1, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached SECOND SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 7,683 words.

Dated: May 1, 2019

XAVIER BECERRA
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/s/ *Jennifer M. Poe*

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: ***People v. Rhoades***
No.: **S082101**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On May 1, 2019, I electronically served the attached **SECOND SUPPLEMENTAL RESPONDENT'S BRIEF** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on May 1, 2019, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 1, 2019, at Sacramento, California.

M. Latimer
Declarant

/s/ *M. Latimer*
Signature

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